No. 11969

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDWARD J. McBRIDE, doing business as Continental Press Service,

Appellant,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

CHARLES H. CARR,
675 Subway Terminal Building, Los Angeles 14,
Attorney for Appellant.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

TABLE OF AUTHORITIES CITED

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Appellee's reply brief shuns practically all of the propositions of law advanced by Appellant in his opening brief and seeks to divert attention to the two main propositions upon which Appellee relies. Those two propositions are: (1) That by signing the application, Appellant expressly contracted that Appellee could discontinue the leased wire service upon receipt of notice from a law-enforcement agency, and (2) that by reason of Tariff Regulation No. 219, the District Court did not have jurisdiction. Appellant has fully demonstrated in his opening brief that the District Court does have jurisdiction under Section 406 of the Federal Communications Act.

In so far as the alleged contractual relationship is concerned, Appellee's brief appears to have the aspects of a

plea of confession and avoidance. Appellee confesses that the service was discontinued by it when it received notice from the law-enforcement agencies of California, but seeks to avoid a hearing and determination of the merits of such notice. In other words, Appellee does not wish to meet the issue as to whether or not Appellant is actually engaged in a legal business.

Point I of Appellee's brief strenuously urges that the mimeographed application for service signed by Appellant was a legally enforceable contract. Apparently Appellee seeks to persuade this court that since the application contained a provision permitting Appellee to discontinue the service upon receiving notice from law-enforcing agencies that the service was being supplied contrary to law, Appellant is without remedy to compel restoration of the service, irrespective of whether the claim of such agencies was with or without substance.

Appellee concludes:

> "It is, of course, elementary that one who has by contract or otherwise expressly authorized an act or course of conduct, may not invoke equitable relief against the normal consequences thereof." (Appellee's Br. p. 8.)

Appellee attempts to transform an ordinary application into a contract, which is not a contract in the legal sense because it lacks mutuality of obligation. Only an agreement which is binding on both parties can have the force of a contract. The application signed by Appellant as customer for Appellee's service could not bind Appellant to receive the service, and Appellant could at will refuse to accept further service even if the express terms of such purported contract were to the contrary. Appellee, on the

other hand, as a public utility, is bound by law at all times to hold out or offer its service to Appellant or any other customer. See:

Southern Express Co. v. R. R. Co., 99 U. S. 191, 25 L. Ed. 319;

Rust v. Conrad, 47 Mich. 449, 11 N. W. 265;

Fowler Utilities Co. v. Gray, 168 Ind. 1, 79 N. E. 897.

Appellee's contention that the application is a contract barring him from seeking relief is without support. The following cases cited by Appellee do not justify such a contention:

Freeman v. Scherer (Kan. 1916), 154 Pac. 1019, 1022;

Stewart v. Hovey (Kan. 1891), 26 Pac. 683;

Downs v. Board of Com'rs (Kan. 1892), 29 Pac. 1077;

Lester v. Sullivan (Ky. 1908), 107 S. W. 300, 301.

An inspection of these cases reveals that they are in no way related to the instant controversy. Each case cited stands for the simple proposition that he who seeks equity must do equity, and that one who invites and encourages a wrong cannot thereafter ask a court of equity to protect him by an injunction from the consequences of that wrong.

There is clearly no question in the instant controversy that concerns contractual obligations between the parties. The relationship between Appellant and Appellee, as noted, is not one of contract but one of relational duties imposed by law. Appellee is a common carrier and is prohibited from making any contract by which its power to perform

its public function would be impaired. Nor can it by contract with an individual or group of individuals avoid the performance of a duty owed to the public.

Western Union Telegraph Co. v. Esteve Bros. & Co., 256 U. S. 566, 65 L. Ed. 1094;

Union Dry Goods Co. v. Ga. Public Service Corp., 248 U. S. 372, 63 L. Ed. 309;

Correll v. Ohio Bell Telephone Co., 63 Ohio App. 491, 27 N. E. 2d 173;

Ala. Water Service Co. v. Wakefield, 231 Ala. 112, 163 So. 626;

In re Doss, 41 Cal. R. R. Com. Reports, 359.

In the *Union Dry Goods Co.* case, *supra,* Plaintiff had a 5-year contract for utility service at a fixed rate of compensation. After the contract had been entered into, the State Commission authorized the utility to charge higher rates and the utility sent the plaintiff a bill for the increased charge. Plaintiff claimed that the act of the utility commission in authorizing higher rates was an impairment of the obligation of his contract in violation of the Federal Constitution. The Court held that the duty of a public utility is to furnish service to all persons without discrimination and that the relationship between the public utility and its customers is not one of contract as the term is generally understood.

Correll v. Ohio Bell Telephone Co., supra, at page 174:

> "A public utility is, by law, regulated strictly in its operation. Rights and privileges which it might seek under ordinary contractual relations are curtailed by provisions of the statutes. Its liabilities are likewise

regulated and limited by statute. The theory is this that, since it renders a service affecting the public, the state shall regulate and control it in order to prevent injustice, and, further, in consideration of such regulation and control, its liability is and should be defined and limited. In a sense it is a matter of contract, on the one hand by the utility, and on the other by the state representing all its citizens."

In *Ala. Water Service Co. v. Wakefield, supra,* the Court states:

"The regulation of the Public Service Commission requiring a contractual relationship between company and customer to be entered into as an initial step to obtain water service is for an orderly conduct of the business. When such regulation is complied with, the service installed, and the customer meets his obligation under the regulations from time to time, the duty of furnishing service is a public duty, a law-made duty, a breach of which is a tort, wherever the measure of damages is governed by the rules of tort action."

In *In re Doss, supra,* the California Railroad Commission ruled with respect to stereotyped contracts for service entered into between a common carrier and its customers (p. 363):

"Respondent appears to believe, however, that if he holds written contracts with all his patrons he may thereby avoid common carrier status and remain within the category of a contract carrier. This is not necessarily true. The essential test of a common carrier is a public holding-out or offer of service. Such a holding-out may exist even when written contracts are made with all shippers or receivers served * * *.

But in the absence of such limitation of service or withholding of public dedication, the essential common carrier nature of the operation is not altered or successfully disguised by the use of any written contracts, whatever may be their form." (Emphasis supplied.)

Williston on Contracts, Vol. I, Sec. 32A, at page 81:

"A century ago it was endeavored to compress under the head of contractual obligations many duties which, in this country at least, are now recognized as falling within those common-law relational duties imposed by the law, rather than assumed by the mutual assent of the parties. These are characterized by their correlative names, representing the reciprocal character of the obligations thrust upon those who enter into one of these common-law relationships of everyday community life, such as * * * public service proprietor and patron, *e. g.,* common carrier of goods and shipper, or innkeeper and guest. It is true that the creation of these relations may be, and quite generally is, co-existent with a contract between the parties with respect thereto, but in practically all jurisdictions *these relations are distinguished from true contract in certain particular. The distinguishing feature is that certain respective rights and duties are defined by law and imposed upon the parties without any question of their knowledge of or assent to these specific terms."* (Emphasis supplied.)

51 *Corpus Juris* 6:

"A utility has no power, however, to make any contract in contravention of public policy, or by which its power to perform its public functions will be impaired, and so it cannot, by contract with another corporation or individual, avoid the performance of of a duty owed to the public, * * *"

It would thus seem that Appellee's argument is without merit, and that Appellant is not precluded from seeking judicial relief for his injuries by reason of his having signed the purported contract for service. Appellant signed the application because it was required that a customer sign such application as a condition precedent to receiving the service requested. Appellant certainly did not intend to enter into any arrangement whereby he would be prevented from thereafter seeking judicial aid to enforce his right to receive service.

Indeed, the recurrent theme of Appellee's argument in his brief with respect to the force and effect of Tariff Regulation 219 and the purported contract for service, discussed herein, is that they effectively foreclose any right of Appellant to challenge in this action the claim that he is directly or indirectly engaged in violation of the law. Apparently Appellee also contends that since it acted under Tariff Regulation 219 and the alleged contract when it terminated Appellee's service, it need no longer consider Appellant as a *bona fide* applicant for interstate Morse wire service. As the tenor of the argument goes, once having lost the service, Appellant has no further recourse in this Court or before any other body against Appellee to compel its restoration, notwithstanding any argument by Appellant that he is engaged in a lawful business. Appellee asserts that Appellant's only recourse is a costly drawn-out litigation before the Federal Communications Commission on an issue the irrelevancy of which is apparent to anyone.

Although Appellee seeks to narrow the instant controversy to the single irrelevant issue of whether or not it acted with impunity in heeding the words of the Public Utilities Commission and law enforcement officers of the

State of California to discontinue Appellant's interstate Morse wire service to the Consolidated Publishing Company, the true issue before the Court is simply whether or not Appellant is entitled to receive interstate Morse wire facilities from Appellee. If Appellant is violating the law and is not entitled to the leased wire service, he has the right to have such issue determined in a duly constituted court of law. As Chief Justice Taft so ably puts it in *Truax v. Corrigan,* 257 U. S. 312, 332, 66 L. Ed. 254, 263:

> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law,—a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society."

It is respectfully submitted that Appellant receive the relief as prayed for in Appellant's opening brief.

Respectfully submitted,

CHARLES H. CARR,
Attorney for Appellant.